Supreme Court, U.S.
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No. ____

In The

Supreme Court Of The United States

October Term, 1997

MARTINS TIMEHIN,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Responden

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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34pp

QUESTION PRESENTED

Whether Dismissal Of Prior Claims As Barred By Statute Of Limitations Creates A Variety Of Preclusion Problems Since Later More Specific Statute Controls Or A Cause Of Action For False Arrest In Civil Action Against City And County Of San Francisco Et Al Who Participated In Martins Timehin's Repeated False Arrests False Imprisonments Accusations Searches And Seizures Assault And Battery And Improper Commitments To Mental Health Clinics And Hospitals And Allegedly Violated Various Of Martins Timehin's Constitutional Rights Stated A Claim?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Martins Timehin, Pro se respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit and the Judgment of the United States District Court For the Northern District of California which are the subjects of this petition, are reported as Martins Timehin v. City and County of San Francisco, et al., 96-15224 CA. (1997) and C-94-3322 DLJ CA. (1996).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 9, 1997. The United States Court of Appeals for the Ninth Circuit affirm the judgment of the United States District Court For the Northern District of California pending United States Court of Appeals for the Ninth Circuit rehearing en banc and this Court's final action in this case. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit is invoked under 28 USCS § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

In all civil prosecutions, the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

From December 3, 1990 to August 15, 1994 Petitioner filed series of claims and complaints against the City and County of San Francisco, et al., for participation in Martins Timehin's repeated false arrests, false imprisonments, accusations, searches and seizures, assault and battery, and involuntary commitments to mental health clinics and hospitals in the Superior Court of The State of California For the County of San Francisco No. 933152 was filed June 11, 1991, and Court Of Appeal Of The State Of California In And For The First Appellate District Division Three, on September 7, 1994, denied Appellant's motion to vacate the dismissal of appeal No. A066074.

Following the claim filed on July 20, 1994 for an allegedly false arrest for rape. The City and County of San Francisco, et al., denied liability and rejected the claim. On September 16, 1994, Martins Timehin filed a Complaint in the United States District Court For the Northern District of California alleging that on various occasions, City and County of San Francisco, et al., caused him severe mental and emotional distress.

And Respondents filed their Motions to Dismiss based on Federal Rules of Civil Procedure 12, and 12(b)(6), or in the alternative 12(e). On May 16, 1995, Petitioner filed a third amended complaint and opposition to dismissal pursuant to FRCP l2(b)(6). On June 7, 1995, That Motion is GRANTED.

The motion to dismiss is DENIED as to the cause of action for false arrest on July 20, 1994, and GRANTED as to all other causes of action, which are DISMISSED WITH PREJUDICE.

The problems that depend solely on the theories of limitations and preclusion arose when the DISTRICT COURT refused to sever the remaining claims or causes of action, since two different statutes of limitations appear to govern. Preclusion should not have arose when the third amended complaint is GRANTED in the district court because it appears that Consolidation of actions apply so long as the third amended complaint is brought and granted on the same cause of action.

Finally, no more difficulty need be presented by an action on the same claim or cause of action if the second forum would have decided independently or the district court to apply the same statute of limitations as led to the cause of action of July 20, 1994, or if the second forum would have decided independently to apply a longer period of limitations, then petitioner would have been free to proceed with the entire claims or causes of action, because both the second forum and the district court should have examined these problems in order.

REASONS FOR GRANTING THE PETITION

Allegedly Martins Timehin appears to challenge the district court's order which dismissed all claims with prejudice except for the false arrest claim involving the July 20, 1994. So, the district court is obligated to sever the remaining claims prior to Summary judgment to avoid preclusion problems as part of the claims are not or may not be barred by statute of limitations. Also, with, allegations of the various claims and complaints taken together and treated as one pleading by the district court, then petitioner argued before the district court that where appropriate utilize certain points in issues opposing severance to support consolidation and conversely use points in issues which opposing consolidation to support issues for severance, and the district court should have vacated the order of dismissal with prejudice on the ground of mistake pursuant to California Code of Civil Procedure Section 473.

I. THE DECISION BELOW PRESENTS A FEDERAL QUESTION

Summary judgment granted on ground that action is barred by statute of limitations as technical or procedural disposition of action rather than substantive and as not precluding subsequent action on new theory on which statute of limitations has not yet run. Koch v. Rodlin Enterprises (1990) 223 Cal. App. 3d 1591, 1595-1597, 273 Cal. Rptr. 438

The doctrine of equitable tolling has been described as bringing together previously separate rationales for tolling periods of limitation, including situations when plaintiff pursues administrative remedies, files a complaint that is later determined to be defective, or institutes an action that seeks to lessen damages or other harm that may have to be

remedied by a second action [Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 923, 191 Cal. Rptr. 681]. California Government Code Section 945.3. Action while charges pending; Limitation period tolled.

Reasonable and Good Faith Pursuit of Alternate Remedy. When an injured person has several legal remedies and, reasonably and in good faith, pursues one designed to lessen the extent of the injury or damages, the period of limitation does not run on the other while he or she is thus pursuing the one (Myers v. Orange County (1970) 6 Cal. App. 3d 626, 634, 86 Cal. Rptr. 198).
California Code of Civil Procedure Section 352. Persons under disabilities.

Probationer Under Order of Restitution
If, after a cause of action accrues against a person, that person comes under an order for restitution as a condition of probation with respect to the specific act or omission giving rise to that person's liability, the time during which the order is in effect is not a part of the time limited for the commencement of an action based on that act or omission [Code Civ. Proc. § 352.5]. Tolling while person liable is under order of restitution.

Disability arising simultaneously with accrual of cause of action as existing when cause of action accrues and, thus, as suspending running of period of limitation. Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 231, 36 Cal. Rptr. 537 (insanity caused by and arising simultaneously with wrongful act on which cause of action based). California Code of Civil Procedure Section 358. When two or more disabilities exist, etc.

II. THE DECISION BELOW CONFERS PRECLUSION PROBLEMS UPON EQUITABLE TOLLING AND TIMELY FILED CLAIMS

Injury Causing Disability Is Basis of Cause of Action. When an incompetency results from a tortious act, the disability exists from the time of the act, and the limitation period is tolled the entire time the person is disabled (Code. Civ. Proc. § 357; Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 230-231, 36 Cal. Rptr. 537; Tzolov v. International Jet Leasing, Inc. (1991) 232 Cal. App. 3d 117, 118, 120, 283 Cal. Rptr. 314. California Government Code Section 815.2 (a). Causes of injuries for which public entity liable; Absence of liability where employee immune.

Action Stayed or Other Legal Inhibition to Sue-General Rule

When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action [Code Civ. Proc. § 356]. This provision means, in general, that the running of a period of limitation is suspended during any period in which the plaintiff is legally restrained from taking action to protect his or her interests [see Eistrat v. Cekada (1958) 50 Cal. 2d 289, 291-292, 324 P.2d 881]. For example, it applies when the plaintiff is legally prevented from taking action to protect his or her rights or when the commencement of an action must await the deliberations and decision of an administrative agency [Hoover v. Galbraith (1972) 7 Cal. 3d 519, 526, 102 Cal. Rptr. 733, 498 P.2d 981].

Prisoner's pro se civil rights complaint was timely filed, for purposes of statute of limitations, when it was lodged with the court even though it was technically deficient under local rules. Lyons v. Goodson, C.A.8 (Ark.) 1986, 787 F.2d 411.

Although state law determines length of limitations period in federal civil rights action, determination of point at which period begins to run is governed solely by federal law. McCoy v. San Francisco, City & County, C.A.9 (Cal.) 1994, 14 F. 3d 28.

CONCLUSION

The ruling of the United States Court of Appeals For The Ninth Circuit constitutes an unprecedented and unwarranted estoppel, respondents who, by his own wrongdoings, prevent the petitioner from instituting his actions until after the period of limitations have run should not be permitted to take advantage of his own wrongs by setting up the statutes as a defense. Petitioner was denied his constitutional rights, due process of law, and the right to prepare his defense where the trial court refused to sever the remaining claims or consolidate claims since, those causes of action are not or may not be barred by statute of limitations.

Respectfully Submitted,

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Pro se

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. A1-A2

JUDGMENT FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. A3-A16

Appeal from the United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Submitted June 3, 1997* *

Before: NORRIS, LEAVY, and TASHIMA, Circuit Judges.

Martins Timehin appeals pro se the district court's dismissal of certain claims, and summary judgment on his remaining claim in this action brought pursuant to 42 U.S.C. § 1983. Timehin alleged that the City and County of San Francisco ("City") and its employees violated his Fourth Amendment rights during separate incidences in which he was falsely arrested, accused, searched, imprisoned, and committed to mental health facilities. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review de novo the district court's dismissal for failure to state a claim, see Sabow v. United States, 93 F.3d 1445, 1450 (9th Cir. 1996), and the district court's grant of summary judgment, see Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996).

Because Timehin appears to challenge the district court's order which dismissed all claims, except for the false arrest claim involving the July 20, 1994 incident, we construe this as a general contention that the district court erred

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a) ; 9th Cir. R. 34-4.

by dismissing those claims. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

After conducting a de novo review of the record, we conclude that the district court properly determined that those claims were either barred by the statute of limitations, see Taylor v. Regents of Univ. of Cal., 993 F.2d 710, 711 (9th Cir. 1993) (per curiam), or the allegations were not specific enough to state a claim, see Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Because Timehin failed to allege facts sufficient to state a claim under section 1983, see Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 624 (9th Cir. 1988), the district court did not err by dismissing those claims.

Timehin contends that the district court erred by granting summary judgment for the City on his Fourth Amendment claim arising from a detention which occurred on July 20, 1994. This contention lacks merit.

Even if Timehin had shown a violation of his Fourth Amendment rights, he failed to establish a causal link between the alleged constitutional violation and City policy or custom. See City of Canton v. Harris, 489 U.S. 378, 385 (1989); Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978); cf. Pierce, 76 F.3d at 1059-1060. Accordingly, the district court did not err by granting summary judgment for the City on this claim. See Alexander v. City of San Francisco, 29 F.3d 1355, 1366-1368 (9th Cir. 1994).

AFFIRMED .

Pursuant to the Court's order granting summary judgment in favor of defendant City and County of San Francisco, judgment is hereby entered in favor of defendant CITY AND COUNTY OF SAN FRANCISCO and against plaintiff MARTINS TIMEHIN.

IT IS SO ADJUDGED.

On January 17, 1996, the Court heard arguments on defendant's motion for summary judgment. Lisa-Anne M. Wong of the San Francisco City Attorney's Office appeared on behalf of defendant City and County of San Francisco. Martins Timehin appeared in propria persona. Having considered the arguments of counsel and the papers submitted, the Court hereby GRANTS defendant's motion for summary judgment.

I. BACKGROUND

A. Factual Background and Procedural History

On September 16, 1994, plaintiff Martins Timehin ("Timehin") filed a complaint in this Court alleging that between 1983 and July, 1994, defendants falsely arrested, falsely imprisoned, falsely accused, battered and assaulted, seized and imprisoned him, and improperly committed him to public mental hospitals and clinics.

The complaint alleged that from December, 1990 until August, 1994, Timehin filed a series of complaints against the City and County of San Francisco for his arrests and hospital commitments. Most of the complaints were dismissed for untimely filing. On July 20, 1994, Timehin filed a claim against the City and County of San Francisco for an allegedly false arrest for rape. The City and County of San Francisco denied liability and rejected the claim.

On October 7, 1994, defendants filed a Motion to Dismiss based on Federal Rule of Civil Procedure 12(b)(6). On December 6, 1994, the motion was granted with leave to amend. Timehin filed his amended complaint on December 20, 1994, and defendants again moved to dismiss, on grounds of failure to state a claim and violation of the statute of limitations.

While the motion to dismiss was pending, plaintiff submitted a third amended complaint. The Court construed plaintiff's filing as a motion for leave to file the third amended complaint. The Court found that the third amended complaint adequately pled a cause of action for false arrest, but that the third amended complaint also contained other causes of action which repeated claims that the Court had previously dismissed without leave to amend.

In an order entered June 12, 1995, the Court granted plaintiff's motion for leave to file the third amended complaint, denied defendants' motion to dismiss as to the cause of action against the City and County of San Francisco ("the City") for false arrest on July 20, 1994, and granted defendants' motion to dismiss as to all other causes of action. All causes of action except for the cause of action against the City for false arrest on July 20, 1994 were dismissed with prejudice. Accordingly, the only remaining defendant is the City.

The City now moves for summary judgment on the one remaining claim for false arrest on July 20, 1994.

B. The July 20, 1994 Incident

In his third amended complaint, plaintiff alleges that he was falsely arrested, strip-searched and photographed by

members of the San Francisco Police Department ("SFPD") on July 20, 1994. Plaintiff alleges that the actions of the SFPD officers on that day constituted a violation of his Fourth Amendment rights and claims damages against the City under 42 U.S.C. § 1983.

The parties express only minor disagreement about the factual circumstances of the July 20, 1994 incident. Officers John Payne and James Zerga were working a plainclothes duty. At 10:47 a.m., they received a dispatch of an attempted rape at 864 Ellis Street in San Francisco. One minute later, the officers received a second dispatch, which described the attempted rape suspect as a black male, about five feet six inches tall, wearing a tan-colored suit, carrying a briefcase, and armed with a knife.

At approximately 10:52 a.m., Officers Payne and Zerga saw a black male, later identified as plaintiff Martins Timehin, walking eastbound on Turk Street, about four to five blocks from the crime scene. Officers Payne and Zerga both state that plaintiff was wearing a tan suit and carrying a briefcase. Plaintiff agrees that he was wearing a tan sportcoat and khaki colored slacks, but he states in his deposition testimony that he was not carrying a briefcase. Depo 37:15-16. Plaintiff first says that he was carrying only his wallet. Depo 37:13-14. Later in his deposition testimony, and again at the hearing on this motion, plaintiff states that he was carrying only a newspaper. Depo 39:18-20. Plaintiff is five feet, eight inches tall.

Payne and Zerga stopped plaintiff at approximately 10:53 am. as he was entering the YMCA building located at 351 Turk Street, San Francisco, California. The officers immediately identified themselves as police officers by saying "Police, Police" and showing plaintiff their badges and

identification. The officers asked plaintiff for identification. According to Payne and Zerga, plaintiff refused to produce any identification. Plaintiff disagrees, stating in deposition that he showed his DMV identification card to the officers. Depo 43:21-25, 44:1-14. The parties agree that plaintiff did not say anything to the officers in response to their questions. Depo 44:1-3.

One of the officers then conducted a pat down search of plaintiff's clothing to make sure he was not armed. The parties agree that plaintiff's clothing was never removed, unbuttoned or unzipped. Depo 45:6-25, 46:1-23. The parties also agree that the only portion of plaintiff's bare skin which the officer conducting the pat down search may have touched would have been located near plaintiff's ankle. Depo 46:21-23.

When the officer conducting the pat down asked plaintiff if he had any weapons or any knives, plaintiff refused to answer. Depo 47:11-13, 48:2-5.

After the pat down was completed, Officers Zerga and Payne asked plaintiff to step outside. Depo 52:1-3. Plaintiff states that one of the officers opened the front door and the other officer held his left arm and escorted him to the front of the building. Depo 53:8-9, 54:5-7. Plaintiff says that he was not in any pain. Depo 54:25, 55:1.

Plaintiff was asked to remain in the front of the building. Plaintiff first testifies that he was told that he was being "detained on the ground of suspicion of rape." Depo 55:18-19. He then states that he was told that he was being "arrested" because he was suspected of rape. Depo 56:3-5.

Officers Zerga and Payne state that plaintiff was asked to wait in front of the building until another SFPD officer brought the victim to the scene to view the plaintiff. Plaintiff was facing the street as a female officer drove slowly by in a squad car with the attempted rape victim. After seeing plaintiff, the victim concluded that he was not the rape suspect. The parties agree that a certificate of release was immediately prepared and issued to plaintiff. Depo 84:17-22.

Plaintiff says that he spent approximately 30 minutes total in front of the building. Depo 64:20-25, 65:1. Defendants say the entire incident lasted approximately thirty minutes. During that time, plaintiff says that several other SFPD officers appeared on the scene, including Officer Gin. Depo 69:1-8. Officer Gin is the officer who signed the certificate of release.

The only other significant factual dispute between the parties is plaintiff's claim that either Zerga or Payne took his picture with a Polaroid camera. Depo 89:7-8. In deposition, plaintiff says this happened sometime after the female officer drove by in the squad car and before the certificate of release was issued. Depo 89:9-17. Neither Zerga nor Payne admits taking a polaroid picture of plaintiff and plaintiff submits no other evidence that he was photographed on that day.

C. Legal Standard

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.' " T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986).

A moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the nonmoving party the burden of raising genuine issues of fact by substantial evidence. T.W. Electric, 809 F.2d at 630 citing Celotex, 477 U.S. at 323; Kaiser Cement, 793 F.2d at 1103-04.

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. T.W. Electric, 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)); Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991).

The evidence the parties present must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty, Inc. v. Niagara Falls, 754 F.2d 49 (2nd Cir. 1985); Thornhill Pub. Co., Inc. v. GTE Corp., 594 F.2d 730,

738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. See, e.g., Fong v. American Airlines, Inc., 626 F.2d 759, 762-63 (9th Cir. 1980). The party who will have the burden of proof must persuade the Court that it will have sufficient admissible evidence to justify going to trial. The standard for judging a motion for summary judgment is the same standard used to judge a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986).

II. ARGUMENTS

A. Fourth Amendment Violation

A city or county cannot be liable for damages based on the actions of one of its employees unless the employee inflicted constitutional harm. City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986); Scott v. Henrich, 39 F.3d 912, 916 (9th Cir. 1994), cert. denied, 115 S. Ct. 2612 (1995); Forrester v. City of San Diego, 25 F.3d 804, 808 (9th Cir. 1994), cert. denied,115 S. Ct. 1104 (1995). This does not mean that the liability of municipalities or counties turns on the liability of individual employees; rather, "it is contingent on a violation of constitutional rights." Scott, 39 F.3d at 916. As such, where the conduct of individual employees is found reasonable and proper, the municipality or county cannot generally be held liable because no constitutional violation occurred. See id.; Forrester, 25 F.3d at 808.[1]

[1] The exception to this general rule is where the alleged constitutional harm is the enforcement of an unconstitutional ordinance or regulation. In cases alleging an unconstitutional ordinance or regulation, it is irrelevant whether the actions of the individual employee were reasonable or not. See Grossman v. City of Portland, 33 F.3d 1200, 1203-04 (9th Cir, 1994). Plaintiff in this case does not allege that the SFPD officers acted pursuant to an unconstitutional ordinance or regulation.

1. Grounds for Detention

A detention is lawful and justified only where the detaining officer can articulate specific facts which caused him to suspect that (1) some criminal activity has occurred, is occurring, or is about to occur, and (2) the person he intends to stop is involved in that criminal activity. In re Tony C., 21 Cal.3d 888, 893 (1978).

In this case, Officers Zerga and Payne had lawful grounds to detain plaintiff. The undisputed facts show that the detaining officers received a dispatch that an attempted rape had occurred and second dispatch providing a description of the rape suspect. The officers then spotted plaintiff within four or five blocks from the scene of the attempted rape. Plaintiff's height, gender, complexion, race, and clothing matched the description of the rape suspect received by the officers. These articulable facts were clearly sufficient to cause the officers to believe that plaintiff had been involved in the attempted rape.

Plaintiff says that, unlike the suspect described in the dispatch, he was not carrying a briefcase at the time of the detention. Given the almost exact match between the description of the suspect and plaintiff's other physical characteristics, combined with the fact that plaintiff was seen within four or five blocks of the crime, plaintiff's claim that he was not carrying a briefcase provides an insufficient factual basis to question the objective reasonableness of the detention.

2. Scope of Detention

A seizure of a person which is limited in duration, scope and purpose is an investigative stop or detention.

See Terry v. Ohio, 88 S.Ct. 1868, 392 U.S. 1 (1968). Although "in some instances [there are) difficult linedrawing problems in distinguishing an investigative stop from a de facto arrest," there is "no rigid time limitation" on investigative detentions. United States v. Sharpe, 105 S.Ct. 1568, 1575 (1985). Instead, the Supreme Court directs courts to look to "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." Id. Generally, courts have ruled that if an officer has reasonable cause to detain a person suspected of a specific crime, the officer may hold that person for a reasonable time for the purpose of enabling a possible identification by the victim of the crime. See United States v. Short, 570 F.2d 1051 (D.C. Cir. 1977).

The detaining officers in this case held plaintiff at the scene just long enough to determine whether or not he was the attempted rape suspect. The parties agree that plaintiff was released almost immediately after the victim viewed plaintiff and failed to recognize him as the suspect. Accordingly, the scope and purpose of the detention was lawful.

3. Pat Down Search

A police officer may lawfully search a suspect's outer clothing for weapons if the officer reasonably concludes that "criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous...." Terry v. Ohio, 88 S.Ct. at 1884-85. The officer must identify himself as a policeman and make reasonable inquiries. Id. The search must be limited in scope to what is necessary to discover weapons. Id. at 1882.

In this case, the detaining officers' search of plaintiff was lawful. As discussed above, the officers had reasonable cause to believe that plaintiff may have been involved in an attempted rape. The dispatch received by the officers indicated that the rape suspect was armed with a knife. When the officer conducting the pat down asked plaintiff if he had any weapons or any knives, plaintiff refused to answer. These facts provided the officers with reasonable grounds to conduct a limited weapons search.

The pat down search conducted was limited and reasonable in scope. The officer conducting the search identified himself as a police officer. The undisputed facts show that plaintiff's clothing was not removed, unbuttoned or unzipped at any time during the search. The parties also agree that the only portion of plaintiff's bare skin which the officer conducting the pat down search may have touched was a small area near plaintiff's ankle. This limited search for weapons was reasonable to protect the safety of the officers and the public.

4. The Polaroid

Plaintiff claims that one of the detaining officers took a polaroid picture of him. Neither of the detaining officers admits to having taken this picture.

In the context of this action, this factual dispute appears immaterial. Plaintiff has not presented any legal authority, and the Court has found no legal authority, to support the notion that a polaroid picture taken during a lawful detention is a Fourth Amendment violation. Plaintiff admits that he was released almost immediately after the victim failed to identify him; as such, it does not appear that the alleged photographing caused him to be detained

longer than necessary to dispel the officers' suspicions about his involvement in the reported attempted rape. Accordingly, the Court finds that photographing the plaintiff did not turn the July 20, 1994 incident into a Fourth Amendment violation.

B. Official Custom or Policy

Even if plaintiff could demonstrate that the July 20, 1994 incident amounted to an unconstitutional violation of his rights, summary judgment for the City is appropriate because plaintiff fails to set forth specific facts demonstrating a genuine issue as to whether the City is subject to liability.

Local governments are "persons" subject to liability under section 1983 where official policy or custom causes a constitutional tort, Monell v. Dep't of Social Servs., 436 U.S. 658, 690 (1978).[2] However, a city or county may not be held vicariously liable for the unconstitutional acts of its employees under the theory of respondeat superior, Id. at 691; Fuller v. City of Oakland, 47 F.3d 1522, 1534 (9th Cir, 1995).

A section 1983 plaintiff may establish local government liability based on official policy or custom only by (1) alleging and showing that a city or county employee committed the alleged constitutional violation under a formal governmental policy or longstanding practice or custom that is the customary operating procedure of the local government entity, (2) establishing that the individual who committed the constitutional tort was an official with final

[2] Local governing bodies may therefore be sued directly under section 1983 for monetary, declaratory or injunctive relief for the violation of federal rights, See Monell, 436 U.S. at 690. They are absolutely immune from liability for punitive damages under section 1983, however. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

policy-making authority and that the challenged action itself was an act of official governmental policy which was the result of a deliberate choice made from among various alternatives, or (3) proving that an official with final policy-making authority either delegated policy making authority to a subordinate or ratified a subordinate's unconstitutional decision or action and the basis for it. Id.; Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992), cert. denied, 114 S. Ct. 345 (1993).

A local government may also be liable for constitutional violations resulting from its failure to supervise and train, but only where the inadequacy of said supervision and training amounts to deliberate indifference. City of Canton v. Harris, 489 U.S. 378, 388 (1989); Mackinney v. Nielsen, 69 F.3d 1002, 1010 (9th Cir. 1995); Davis v. City of Ellensburg, 869 F.2d 1230, 1235 (9th Cir. 1989). There need be a close causal nexus between the alleged deficient supervision and training and the injury suffered. Only where a failure to supervise and train reflects a " 'deliberate' or 'conscious' choice" by a local government can the local government be liable under section 1983. Harris, 489 U.S. at 389. Further, the plaintiff must demonstrate that the alleged deficiency in supervision and training actually caused the requisite indifference. Id. at 391. The appropriate inquiry is therefore whether the injury would have been avoided "had the employee been trained under a program that was not deficient in the identified respect." Id.

Plaintiff presents no evidence that the July 20, 1994 incident resulted from a City policy or custom. Assuming that the July 20, 1994 incident amounted to a violation of plaintiff's Fourth Amendment rights, plaintiff still has not shown that the incident resulted from any actual city policy.

There is also no evidence to support a finding that a

policy-making official approved or ratified the actions of the detaining officers. Thus, plaintiff cannot show that the incident resulted from the decision of an official with final decision-making power.

Similarly, plaintiff has failed to produce evidence even suggesting that the actions of the officers conducting his detention and frisk were part of a widespread practice or custom by the City. Random acts or isolated incidents are insufficient to establish custom. Thompson v. City of Los Angeles, 885 F.2d 1439, 1444 (9th Cir. 1989). Plaintiff presents no evidence of other similar detentions and frisks by SFPD officers and no evidence of SFPD officers photographing other individuals under similar circumstances.

Finally, plaintiff presents no evidence supporting his assertion that the alleged injury resulted from the City's failure to train or supervise the detaining officers. Plaintiff identifies no specific respect in which the officers' training was deficient. Plaintiff also fails to produce any evidence that the alleged failure to train was the result of a "deliberate" or "conscious" choice by the City. Accordingly, plaintiff has failed to meet his burden of producing evidence sufficient to defeat defendant's motion for summary judgment.

III. CONCLUSION

Because plaintiff cannot make the threshold showing of the existence of an official City custom or policy, the Court need not determine whether the incident itself violated plaintiff's constitutional rights. In this case, however, it appears that the detention was based on reasonable suspicion and was limited in scope and time. The dispatch describing the rape suspect received by the officers provided articulable grounds for both the detention of plaintiff and the pat down

search for weapons. It appears that plaintiff was detained only long enough to dispel the officers' reasonable suspicions about his involvement in the attempted rape. Accordingly, even if a City policy or custom could be shown, the detention and frisk alleged in this case did not violate plaintiff's Fourth Amendment rights.

IT IS SO ORDERED.

"S/D. Lowell Jensen".